U.S. Department of Justice

United States Attorney
Eastern District of New York

PKC/DAS/HLJ/AS
F.# 2010R00212

271 Cadman Plaza East
Brooklyn, New York 11201

January 27, 2011

BY HAND AND ECF
Honorable Edward R. Korman
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Joseph Yannai
Criminal Docket No. 10-594 (ERK)

Dear Judge Korman:

The government respectfully submits this letter in opposition to the defendant's appeal of Judge Azrack's Report and Recommendation ("R&R") regarding bail. For the reasons set forth below, the government respectfully submits that this Court should adopt the R&R in its entirety, and deny the defendant's modified bail application. A status conference in this case is scheduled for Friday, January 28, 2011 at 11:00 a.m.

I. Background & Procedural History

On the morning of August 3, 2010, the defendant attempted to commit suicide when he learned that law enforcement authorities had arrived at his home to arrest him on federal charges. On August 11, 2010, a bail hearing was conducted before the Honorable James Orenstein, wherein the defendant and his wife testified. At the conclusion of the hearing, Judge Orenstein found that "Mr. Yannai attempted suicide precisely because of the pendency of the federal charges and because of his view that he would be convicted and sentenced to significant jail time. And that he was unwilling to face that possibility rather than kill himself." Transcript of Proceedings, August 11, 2010 (hereinafter "Aug. 11 Tr."), at 89.

Judge Orenstein noted that he had "some strong reservations about the completeness and accuracy of the testimony

[he] heard from Mr. Yannai" and "I agree that there is a strong incentive for Mr. Yannai to flee and believe that given the opportunity he might well act on that motivation and make an attempt to flee." Aug. 11 Tr. at 88-89. Nonetheless, despite "very strong reservations," Judge Orenstein granted Yannai's request to set conditions of release.

Judge Orenstein therefore set bail in the amount of $500,000, on the condition that the bond be signed by one additional surety who would secure the bond with property having equity in the amount of $500,000. Tr., 105-06. Judge Orenstein further ordered that the surety must be someone other than the defendant's wife, and the security must be property other than the home where the defendant and his wife resided ("the Pound Ridge Home").

On September 27, 2010, the defendant filed an application before Judge Azrack to modify Judge Orenstein's order to permit the Pound Ridge Home to secure the bond. As Judge Azrack noted, "[b]ecause defendant's modified bail application was per se contrary to Judge Orenstein's explicit conditions, I denied the application." R&R, at 2 (citing Transcript of Criminal Cause for Bond Satisfaction, September 27, 2010, at 2-6).

The defendant next sought to appeal Judge Azrack's order to this Court, for the purpose of permitting the Pound Ridge home to be used as collateral for the bond. At the time the defendant made this application, he failed to disclose the critical fact that the Pound Ridge Home was in foreclosure. Instead, the government determined this fact through its own investigation and alerted the Court. After learning of the foreclosure status of the Pound Ridge Home, this Court referred the matter to Judge Azrack for a determination of (1) why the Pound Ridge Home is in foreclosure; and (2) what is the most likely available equity in the Pound Ridge Home.

II. Judge Azrack's Determinations

Judge Azrack held a hearing on December 14, 2011 at which the defendant's wife and a real estate expert testified. As Judge Azrack notes in the R&R, on December 20, 2010, IndyMac Mortgage Services ("IndyMac"), which owns the mortgage on the Pound Ridge home, issued a letter indicating that the defendant's wife owed a total past-due balance of $85,490. R&R, at 3, fn. 1. There appears to be no dispute that the defendant owes a total amount of approximately $630,000 on the mortgage to IndyMac. R&R, at 3.

A. Fusillo's False Testimony

At the hearing, the defendant's wife, Elena Fusillo, testified that she had deliberately ceased payments on the mortgage because a representative of IndyMac had instructed her to do so in order to qualify for a loan modification. R&R, at 4. The Court rejected this testimony as not "the least bit credible." Id. As an initial matter, Judge Azrack noted that Fusillo's testimony was directly contradicted by IndyMac's records, which indicate that Fusillo ceased making mortgage payments because the "economy is down." See Letter from IndyMac, December 20, 2010 (attached as Ex. 2 to Government Letter, December 20, 2010, ECF entry 42).

Moreover, Judge Azrack concluded that the government's cross-examination of Fusillo revealed "numerous inconsistencies within Fusillo's financial affidavit in her loan modification." R&R, at 5. Fusillo "implausibly states that she spends $50 per month, or roughly $12.50 per week, on food...[and] listed unreasonably low amounts spent on other essentials...[and] there is an unaccounted for discrepancy" in Fusillo's claimed monthly and annual income. R&R, at 5. In addition, as Judge Azrack noted, "[m]ost enlightening in terms of evaluating Fusillo's credibility is that she claims to have been 'unaware' of not fewer than four lawsuits filed against her for outstanding debts in the past ten years." Id. Indeed, the government provided an affidavit of service proving that Fusillo was personally served with one of these lawsuits on August 27, 2010 -- less than four months before her testimony in which she claimed to be unaware of it. Id., at 6. Finally, Judge Azrack noted that "Fusillo failed to mention in her financial affidavit a $40,000 second line of credit she took out on the Pound Ridge Home, an omission she characterizes as 'an oversight.'" R&R, at 6.

Judge Azrack concluded that "these glaring inconsistencies and oversights vividly illustrate Fusillo's suspect credibility" and therefore determined that Fusillo's failure to pay the mortgage was entirely the result of "her own negligence and systemic inability to make payments on her debts." R&R, at 6.

B. The Lack of Equity in the Pound Ridge Home

After noting that “the final sale price of property...depends on many factors and cannot be divined with any great degree of certainty,” the Court evaluated the appraisals provided by the parties. The Court initially rejected the defendant’s appraisal from 2007, which is outdated and conducted prior to the mortgage and housing crisis. R&R, at 8. Next, the Court noted that the defendant’s more recent appraisal valued the home at $920,000, while separate appraisals conducted on behalf of IndyMac and the government each valued the home at $750,000.

Even taking the defendant’s appraisal of $920,000, the Court concluded that “there is no possible way for the Pound Ridge Home to yield enough equity to cover the defendant’s $500,000 bond.” R&R, at 8. Judge Azrack noted that the $920,000 sale price would first go to pay the approximately $630,000 outstanding balance to IndyMac. Second, these funds would be used to pay any outstanding legal fees incurred through the foreclosure process, as well as tax liens –- amounts that IndyMac has informed the government will equal approximately $36,000 in total. See Government Letter, December 13, 2010 (ECF Entry 39). Third, the proceeds would be used to pay the outstanding second mortgage of $40,000. R&R, at 8. Judge Azrack concluded that, “at most, somewhere in the neighborhood of $225,000 would be left for equity, far short of the $500,000 necessary to cover the defendant’s bond.” R&R, at 9.

Significantly, Judge Azrack concluded that even this amount was unrealistically high. Judge Azrack held that “it is much more likely that the Pound Ridge home would sell for a price closer to the Government’s two $750,000 appraisals.” R&R, at 9. Judge Azrack based this conclusion on the fact that two separate, independent appraisals had reached the same conclusion, as well as flaws in the defendant’s appraisal concerning the proximity of comparable properties, which were used as the basis for the appraisal. R&R, at 9. Juge Azrack therefore concluded that the defendant’s bail modification should be denied.

III. The Defendant's Objections to the R&R Should be Rejected

Because the defendant cannot –- and, indeed, does not -– contest most of the facts set forth above, he instead relies upon a series of factual distortions, all of which should be rejected.

A. The Defendant Continues to Present a Strong Risk of Flight

As an initial matter, the defendant attempts to reopen the issue of his risk of flight, arguing that he complied with all the conditions of his bond for over a year in the state prosecution, and that the federal case is more difficult for the prosecution to prove than the state case. Defense Submission, January 19, 2011, at 2. This claim obscures critical facts and misrepresents the law. As an initial matter, there are a number of factors which make the federal prosecution significantly more likely to result in a conviction. First, the sex trafficking charges in the state prosecution arose under the New York Anti-Human Trafficking Act, which was passed in 2007. As such, none of the defendant's actions prior to 2007 could have been used as a basis for prosecution under that statute. By contrast, the federal indictment in the instant case alleges conduct beginning in 2003. Moreover, while the state prosecution was based upon evidence obtained from three victims, the federal prosecution relies upon at least eight victims, including victims who reside overseas.

In any case, we need not speculate about whether the differences between the state and federal case would affect the defendant's view of the likelihood of a conviction: he testified about this very issue at the bail hearing. According to the defendant, the night before his suicide attempt, he met with three criminal defense attorneys who informed the defendant that he faced likely federal charges. Aug. 11 Tr., at 32. The defendant testified that he feared the federal charges, and, as a result, he attempted to commit suicide. Id. As noted above, Judge Orenstein found that the defendant took this action because of his fear that he would be convicted and sentenced to a lengthy jail term in the instant case, and the defendant has never challenged that finding. Therefore, the defendant's actions with respect to the state case are simply irrelevant, as the defendant's own behavior demonstrates that the federal case has created a strong incentive for him to flee.

In short, the fact of the defendant's suicide attempt represents a tremendous risk of flight for multiple reasons. As the case progresses to trial, it will become increasingly apparent to the defendant that he faces a likely conviction and a potentially lengthy term of incarceration. Given the defendant's past actions, there is a significant risk that the defendant could again attempt to commit suicide, thus creating a risk of non-appearance at trial. In addition, as the government has previously noted, if the defendant is willing to take the extreme step of suicide to avoid prosecution, he would certainly be willing to take the less drastic measure of fleeing. This high risk of flight will remain throughout the case, until the defendant has completed any sentence ultimately imposed.

B. The Bail Conditions Require the Bond to be Fully Secured by Property

The defendant next attempts to alter Judge Orenstein's original bail conditions, by claiming that he can secure the bond by a combination of property and income from sureties. In support of this claim, the defendant selectively cites to a portion of Judge Orenstein's order. At the end of a lengthy bail proceeding, Judge Orenstein initially pronounced bail conditions as follows:

> I will set conditions of bail equivalent to what's been proposed, $500,000 bond secured by property with equivalent value to the defendant's home and by a surety who is financially responsible and to the point where a combination of property and income can meet the amount of the bond.

Aug. 11 Tr., at 90-91. Concerned about this apparent ambiguity in the conditions, the government sought clarification:

> MR. SPECTOR: Judge, just a clarification I guess I may have missed it.
>
> THE COURT: Uh-huh.
>
> MR. SPECTOR: The additional surety is to provide property that has equity of –
>
> THE COURT: Yes.

MR. SPECTOR: -- $500,000.

THE COURT: Yes.

MR. SPECTOR: Okay.

Id., at 106. This record makes clear that the $500,000 bond ordered by Judge Orenstein must be fully secured by property, and fatally undermines the defendant's belated attempt to secure the bond through other means.

C. Foreclosure of the Pound Ridge Home is Likely

The defendant repeatedly claims that his wife has the means to repay the arrears on her home at any time, and therefore asserts that "it is virtually certain the Ms. Fusillo will not lose her home." Defense Submission, at 10-12. This claim is belied by virtually every aspect of the record discussed above. As noted in the IndyMac records and as Judge Azrack found, Fusillo has failed to pay her mortgage entirely as a result of "her own negligence and systemic inability to make payments on her debts." R&R, at 6. Indeed, this conclusion is entirely consistent with the well-established record of Fusillo's failure to pay her other debts, which have resulted in multiple judgments against her. Against this record, the defendant relies entirely on Fusillo's uncorroborated claim that she deliberately stopped payment as part of a strategy to obtain a loan modification.

The defendant's assertion is a direct attack upon Judge Azrack's credibility findings. As noted above, Judge Azrack specifically held that Fusillo's stated explanation for her failure to pay her mortgage was not credible. Thus, the premise upon which the defendant's claim is based -- that Fusillo could repay the past-due balance at any time but chose not to -- was explicitly rejected by Judge Azrack. As the finder of fact, Judge Azrack's credibility determinations are subject to substantial deference on appeal. See United States v. Lucky, 569 F.3d 101, 106 (2d Cir. 2009) (noting "special deference" owed to findings based on witness credibility); Cullen v. United States, 194 F.3d 401, 407 (2d Cir. 1999) ("a district judge should normally not reject a proposed finding of a magistrate judge that rests on a credibility finding without having the witness testify before the judge.").

Moreover, Judge Azrack's conclusions were amply supported by the record: Fusillo's implausible statement that she spends only $2 per day on food, as well as other inconsistencies in Fusillo's mortgage modification application; Fusillo's claim to be unaware of the four lawsuits filed against her for outstanding debts; and Fusillo's failure to disclose in her mortgage modification application the $40,000 second line of credit on her Pound Ridge Home. R&R, at 5-6.[1/] Therefore, the defendant's claim concerning Fusillo's ability to repay the outstanding mortgage balance should be rejected in light of Judge Azrack's finding that Fusillo testified falsely, and provided false information on her application for a loan modification.

There is an additional aspect of the defendant's claim which is troubling. During the December 14, 2010 hearing before Judge Azrack, Fusillo testified that she had $70,000 in her checking account. Transcript of Proceedings, Dec. 14, 2010 (hereinafter "Dec. 14 Tr"), at 13. Yet four months earlier, during the initial proceeding held before Judge Orenstein on August 11, 2010, Fusillo testified that she held only $23,000 in her checking account. Aug. 11 Tr., at 70. Thus, Fusillo purportedly increased the amount in her checking account by nearly $50,000 in only four months, despite the fact that, according to her testimony at the August 11 proceedings, she had no funds in any other bank accounts, investments or stocks. Id. Such an increase in funds is particularly remarkable in light of the fact that Fusillo purportedly earns $80,000 per year. Dec. 14 Tr., at 12.

In any case, even taking the defendant's dubious claims concerning Fusillo's financial situation at face value, she still lacks the ability to pay off her overdue mortgage balance and reinstate her loan. As noted above, according to IndyMac, as of December 20, 2010, the total amount past due on Fusillo's mortgage is $85,940.60 -- some $15,000 in excess of even Fusillo's claimed current assets.

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[1] In an attempt to avoid Judge Azrack's findings, the defendant claims that she had no motive to lie on the mortgage modification application. To the contrary, such motive is obvious: in order to qualify for the modification, Fusillo wanted to minimize her expenses and maximize her income. It is unsurprising, therefore, that she did so by grossly understating her expenses for such items as food, while providing inaccurate information concerning her income.

Indeed, there can be no question that, at least since December 21, 2010, it was abundantly clear that IndyMac would not be granting a loan modification to Fusillo. Yet for the past month Fusillo has failed to reinstate her loan, which results in the outstanding principal and interest balance continuing to grow. Particularly in light of its significance to the instant litigation, one would expect that if Fusillo had the means to reinstate her mortgage she would have done so. Her failure to do so, combined with the other outstanding judgments against her, clearly demonstrates that the foreclosure of the Pound Ridge Home is now inevitable.

D. There is No Equity in the Pound Ridge Home

In the face of the record set forth above, the defendant claims that a hypothetical purchaser may purchase the Pound Ridge home for a high amount for unspecified "personal reasons." This claim is entirely speculative and should be rejected. Indeed, the defendant appears to base this claim on the assertion that the Pound Ridge Home is in a "desirable and expensive part of Westchester County" and cites to other aspects of the home which he believes make it valuable. Defense Submission, at 8.

While the defendant attempts to rely on the testimony of attorney Barry Nesson for the value of the home, Judge Azrack correctly precluded him from testifying as an expert in this area, as Nesson is not a professional appraiser. Instead, rather than relying upon the speculation put forth by the defendant, this Court, consistent with Judge Azrack's ruling, should rely upon the professional appraisals submitted to the Court. These appraisals base their valuations on comparable properties -- properties which presumably share the attributes the defendant describes concerning his own property. Tellingly, two independent appraisals submitted by the government, one conducted on behalf of the government, the other on behalf of the bank, value the property at $750,000. As discussed above, this valuation would result in virtually no equity available in the property after foreclosure and repayment of other debts secured by the property.

E. The Sureties Proposed by the Defendant are Insufficient to Secure the Bond

Finally, even if the Court were inclined to overturn Judge Azrack's R&R and modify Judge Orenstein's order, and thus permit the defendant to secure the bond using sureties, the sureties that he proposes are woefully insufficient to secure the bond. The defendant proposes two sureties, his sister-in-law, who earns approximately $60,000 per year, and his brother-in-law, who earns approximately $40,000 per year. While the financial position of these sureties is unclear, it appears that these sureties own no property, and have underage dependent children. At the September 27, 2010 hearing, the defendant claimed that the sureties held assets in a retirement fund of $100,000. Even assuming these funds would be available as collateral –- an unlikely proposition for funds held in a retirement account –- this amount falls far short of the $500,000 necessary to secure the bond. As such, the sureties cannot serve as substitute for property.

Moreover, in light of the various judgments against Fusillo, combined with the revelations concerning her false statements on her mortgage modification application, and her “suspect credibility” as determined by Judge Azrack, Fusillo cannot be said to be a “financially responsible surety” and is therefore also unsuitable as a surety on the bond.

IV. Conclusion

For the reasons set forth above, the government respectfully submits that the Court should adopt the R&R in its entirety, and deny the defendant's application to modify the conditions of the bond.

Respectfully Submitted,

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